In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1016

CHIP STEAK CO., INC., ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xxi) is reported at 467 F. 2d 481. The opinion of the district court (Pet. App. iii) is reported at 332 F. Supp. 1084.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. A timely petition for rehearing was denied on November 20, 1972. The petition for a writ of certiorari was filed on January 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

497-522—73

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture followed appropriate procedures in promulgating a regulation banning the use of sorbates in meat and meat food products.

2. Whether the Secretary of Agriculture, in regulating the use of additives in meat and meat food products, is bound by determinations of the Secretary of Health, Education, and Welfare under the Federal Food, Drug, and Cosmetic Act.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. G, pp. ii–iv.

STATEMENT

Petitioners, meat packers and meat processors, brought this action against the Secretary of Agriculture to challenge his long-standing regulation that no substance may be used in meat and meat food products unless such use is expressly permitted by the Secretary.[1] Petitioners' amended complaint alleged that the Secretary's regulation illegally prohibited them from using sorbates[2] in cooked sausage and other meat products. While the suit was pending, the Department of Agriculture issued notice of proposed rulemaking looking toward a complete revision of federal meat inspection regulations, including those

[1] See 9 C.F.R. 268.7(a) (10 Fed. Reg. 3339, March 29, 1945); 9 C.F.R. 18.7(a) (1949); 9 C.F.R. 318.7(a) (1966).

[2] Sorbates include sorbic acid, calcium sorbate, sodium sorbate and potassium sorbate.

challenged in this action. 34 Fed. Reg. 13194. The district court held the action in abeyance during the pendency of the rulemaking proceedings.

The petitioners, recognizing that the proposed regulations would prohibit the use of sorbates, participated in the rulemaking proceedings by filing objections to the proposed regulations concerning food additives. The Secretary's revised regulations, issued on October 3, 1970, reaffirmed the rule prohibiting the use of all substances in the preparation of meat products at federally inspected plants unless such use is specifically permitted by the Secretary. 9 C.F.R. 318.7(a) (35 Fed. Reg. 15588). The revised regulations also provide that "No substance may be used in or on any product if it conceals damage or inferiority or makes the product appear to be better or of greater value than it is," and that, therefore, "[s]orbic acid, calcium sorbate, sodium sorbate, and other salts of sorbic acid may not be used in cooked sausage or any other product * * *." 9 C.F.R. 318.7(d) and (d)(2) (35 Fed. Reg. 15592).[3]

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[3] The Secretary stated (35 Fed. Reg. 15553):

"* * * The presence of sorbates in sub-surface sausage tissues results in changes in bacterial flora of the products. Sorbates have been demonstrated to inhibit selectively the development of aerobic bacteria and simultaneously permit the luxuriant growth of clostridium perfringes and clostridium botulinum, which are organisms associated with serious health hazards. The use of sorbates for such products therefore conceals damage and inferiority, i.e., the fact that the products are decaying because of bacterial action, and makes the products appear better and of greater value than they are in view of their decomposing condition."

Thereafter, the district court, on cross-motions for summary judgment, granted summary judgment for the Secretary. The court held that the regulation specifically banning the use of sorbates in meat and meat food products (9 C.F.R. 318.7(d)(2)) was a valid exercise of the Secretary's independent powers to protect the consumer against adulterated meat, and that the Secretary's rulemaking procedures were appropriate (Pet. App. B). In a *per curiam* opinion, the court of appeals unanimously affirmed (Pet. App. D).

ARGUMENT

1. Petitioners challenge the propriety of the procedures followed by the Secretary of Agriculture in promulgating the new regulations, alleging that he failed to follow the procedures governing the regulation of food additives by the Secretary of Health, Education, and Welfare under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348) (Pet. 12), and, if those procedures are inapplicable, that he failed to observe the requirements of the Administrative Procedure Act for rulemaking (Pet. 15). Both of these contentions are fully considered and properly rejected in the opinion of the district court, upon which we rely (Pet. App. B, pp. vi–xi). We add only that the inapplicability of the Food, Drug, and Cosmetic Act procedures to meat additive regulation by the Secretary of Agriculture was specifically called to the attention of Congress during its consideration of the Wholesome Meat Act of 1967,* but Congress failed

*See Hearings before a Subcommittee of the Senate Agriculture and Forestry Committee, 90th Cong., 1st Sess., on S. 2147, S. 2218, and H.R. 12144, at 106–107.

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to enact any such requirement as part of that legislation. It is also clear, for the reasons stated in the opinion of the district court (*id.* at xiii–xvii), that it correctly rejected the contention that the administrative record contained no evidence supporting the conclusion that the use of sorbates in meat products should be prohibited.[5]

2. Petitioners further contend (Pet. 11) that 9 C.F.R. 318.7(d)(2) is invalid because HEW has approved sorbates when used "in accordance with good manufacturing practice" (21 C.F.R. 121.101 (a), (d)) and because, in petitioners' view, the Secretary of Agriculture, in regulating the use of additives in meat and meat food products, is bound by determinations of HEW under the Food, Drug, and Cosmetic Act. The courts below, however, recognizing the Secretary of Agriculture's independent jurisdiction over meat inspection, properly rejected petitioners' con-

[5] Petitioners object to the Secretary's apparent reliance upon a memorandum by a leading Department scientist describing certain hazards associated with the use of sorbates in meat products (Pet. 16), noting that this was written after the deadline for receiving comments on the proposed regulations. However, it is settled that in informal rulemaking proceedings of the type here involved, an agency may rely upon "information available in its own files, and upon the knowledge and expertise of the agency." *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 54 (C.A. 9), certiorari denied, 389 U.S. 844; *Siegel* v. *Atomic Energy Commission*, 400 F. 2d 778, 786 (C.A.D.C.); *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 862 (C.A. 5). Here, the Secretary properly relied upon the published scientific articles in the Department's files and the evaluation of those publications by the scientific experts in the Department, whose function it is to assist the Secretary in rulemaking proceedings.

tention.[6] In 1938, Congress specifically exempted meat and meat food products from the application of the Food, Drug, and Cosmetic Act "to the extent of the application or the extension thereto of" the Meat Inspection Act of 1907. 52 Stat. 1059, 21 U.S.C. 392(a). In 1958, Congress amended the Food, Drug, and Cosmetic Act to give HEW general power to regulate the use of food additives. 21 U.S.C. 348. But the 1958 amendments explicitly preserved the independent authority of the Secretary of Agriculture over meat inspection. Section 7 of the 1958 Act, 72 Stat. 1789, specifies:

> Nothing in this Act shall be construed to exempt any meat or meat food product or any person from any requirement imposed by or pursuant to the Poultry Products Inspection Act * * * or the Meat Inspection Act of March 4, 1907 * * *.

Commenting on the above section, the House Committee report emphasized:

> The bill as amended provides that nothing in this legislation shall be construed to exempt any meat or meat food product or any person from any requirement imposed by or pursuant to the Meat Inspection Act of March 4, 1907. *This provision would leave unaffected the jurisdiction of the Department of Agriculture with respect to food additives in establishments which are subject to the Meat Inspection Act.*

[6] There is also a serious question whether the use of sorbates in cooked sausage and other meat products even meets HEW's requirement that the additive be used "in accordance with good manufacturing practice." See Leighty affidavit, attached to Brief for the Appellees in the court of appeals.

H. Rep. No. 2284, 85th Cong., 2d Sess., p. 7 (emphasis added).[7]

The continuing independent authority of the Secretary of Agriculture over meat inspection was recognized and reaffirmed by the Wholesome Meat Act of 1967, whose purpose was to modernize the Meat Inspection Act and thereby to provide maximum protection to the consumer against unsanitary, adulterated, misbranded or diseased meat and meat food products. 21 U.S.C. 602; S. Rep. No. 799, 90th Cong., 1st Sess., p. 13. The 1967 Act provided that an article shall be deemed adulterated, *inter alia,* if it is unsafe under the Food, Drug and Cosmetic Act or if it "is prohibited by regulations of the Secretary [of Agriculture] in establishments at which inspection is maintained under this subchapter." 21 U.S.C. 601(m)(2)(C) and (D). The Senate Committee noted (S. Rep. No. 799, *supra,* at 7):

> * * * a proviso is added to allow the Secretary of Agriculture to impose more stringent restrictions for * * * food additives * * * in or on meat products subject to the new act than are imposed by the Secretary of Health, Education, and Welfare under the Federal Food, Drug, and Cosmetic Act.

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[7] The Senate Report and the floor debates similarly emphasized that the 1958 Act left "unaffected the jurisdiction of the Department of Agriculture with respect to the use of food additives in meat or meat food products in establishments which are subject to the Meat Inspection Act" and that "it is not the intention of the Congress in passing this bill to in any way affect the scope or nature of the jurisdiction of the Department of Agriculture * * *." S. Rep. No. 2422, 85th Cong., 2d Sess., p. 9; 104 Cong. Rec. 19359.

Congress thus intended the Secretary of Agriculture to have independent authority over meat inspection and has empowered him to apply the resources, staff and knowledge of the Department of Agriculture to the specialized problem of meat inspection. While the Secretary may not have power to permit the use of additives deemed unsafe by HEW, he can prohibit the use of additives in meat and meat products regardless of their approval by HEW for other uses.

3. Petitioners also challenge (Pet. 7) the Secretary of Agriculture's regulation, 9 C.F.R. 318.7(a), which prohibits the use of all substances in the preparation of meat products at federally inspected plants unless such use is specifically permitted by the Secretary. Both courts below correctly considered it unnecessary to discuss this additional point, since the regulation specifically banning sorbates, 9 C.F.R. 318.7(d)(2), governs the concrete issue raised in this case. See *Toilet Goods Assn.* v. *Gardner,* 387 U.S. 158, 164–165.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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